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MAR 10 1972

MICHAEL RODAK, JR., CLERK

No. 71-6078

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1971

LINDA R. S., ET AL.,

Appellants

v.

STATE OF TEXAS, ET AL.,

Appellees

MOTION TO AFFIRM

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JURIS. STATEMENT NOT PRINTED

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Appellees, the State of Texas, Robert Calvert, Chief Justice of the Texas Supreme Court, and Crawford C. Martin, Attorney General of Texas, move that the judgment entered by the Court below be affirmed on the ground that the questions are so unsubstantial as not to warrant further argument.

STATEMENT OF THE CASE

This action is an appeal by the Appellants, Linda R. S., her minor child, and all other mothers and children of the class they allegedly represent from the judgment entered by the Court below on the 1st day

of November, 1971, in a class action commenced by the Appellants against the Appellees, wherein the Appellants sought: (1) a declaratory judgment holding invalid Article 602 of the Texas Penal Code and Article 4.02 of the Texas Family Code, (2) an injunction requiring the State of Texas and its officers to cease certain alleged discriminatory application of Article 602 of the Texas Penal Code and Article 4.02 of the Texas Family Code, and (3) an order requiring Richard D., the alleged father of Linda R. S.'s child to pay child support.

The Appellants in this proceeding are women and minor children who have sought, are seeking, or in the future will seek to obtain support for illegitimate children from the child's father.

The Court below, in its judgment entered on the 1st day of November, 1971, held that the Appellants lacked the proper standing to challenge the validity of Article 602 of the Texas Penal Code and dismissed that portion of the case. As to the remaining portion of Appellants' case, the Court below held that the provisions of Article 4.02 of the Texas Family Code were of such nature as to be improper for consideration by a three-judge federal court and remanded this portion of the proceeding to the judge to whom the application for injunction was originally presented for further proceedings. From the foregoing action of the Court below, the Appellants have brought this appeal.

OPINION BELOW

The opinion of the United States District Court for the Northern District of Texas, Dallas Division, rendered on the 1st day of November, 1971, not yet re-

ported, is attached to Appellants' Jurisdictional Statement as Appendix "A."

STATUTES INVOLVED

Article 4.02 of the Texas Family Code provides that:

> "Each spouse has the duty to support his or her minor children. The husband has the duty to support the wife and the wife has the duty to support the husband when he is unable to support himself. A spouse who fails to discharge the duty of support is liable to any person who provides necessaries to those to whom support is owed."

Article 602 of the Texas Penal Code provides that:

> "Any husband who shall willfully desert, neglect or refuse to provide for the support and maintenance of his wife who may be in necessitous circumstances, or any parent who shall willfully desert, neglect or refuse to provide for the support and maintenance of his or her child or children under eighteen years of age, shall be guilty of a misdemeanor, and upon conviction, shall be punished by confinement in the County Jail for not more than two years."

ARGUMENT

The Appellants in the instant proceeding have brought a class action in behalf of all women and minor children who have sought, are seeking, or in the future will seek to obtain support for illegitimate children from the child's father. The Appellants seek a declaratory judgment that Article 4.02 of the Texas Family Code and Article 602 of the Texas Penal Code are unconstitutional on their face and have been unconstitutionally applied so as to systematically exclude unwed mothers and children of unwed mothers from the benefits of Article 4.02 of the Texas Family

Code and Article 602 of the Texas Penal Code. The Appellants further seek a permanent injunction requiring the State of Texas to cease its discriminatory application of its child support laws and that the Defendant below, Richard D., be required to pay a reasonable amount of money for the support of his illegitimate child whose mother is the Appellant, Linda R. S.

The Appellants have attempted to invoke the jurisdiction of the Court below under the Ninth and Fourteenth Amendments to the United States Constitution; 28 U.S.C. Sections 1331, 1343, 2201, 2202, 2281, and 2284; and 42 U.S.C. Section 1983.

While the Appellants in their Jurisdictional Statement attempt to raise issues before this Court dealing with the merits of their case, the only issues actually before this Court deal with jurisdiction and standing. The Court below reached no decision on the merits of Appellants' argument dealing with the validity of Article 602 of the Texas Penal Code for the reason that the Court felt, and so held, that Appellants lacked the proper standing to challenge the provisions of this statutory enactment. In turn, the issues concerning the validity of Article 4.02 of the Texas Family Code were not decided on the merits but merely remanded to the one-judge court for further proceedings.

In view of the foregoing, Appellees submit that this case is not before this Court on issues dealing with the merits of Appellants' allegations, but merely upon jurisdictional questions.

The Court below held that the Appellants lacked the proper standing to challenge the validity of Article

602 of the Texas Penal Code and dismissed this portion of Appellants' case.

Article 602 of the Texas Penal Code provides that any "husband" who fails to support his wife, or any "parent" who fails to support his "child" is subject to criminal prosecution and punishment. However, the Texas courts have held that only parents of legitimate children may be criminally prosecuted under Article 602 of the Texas Penal Code. *Beaver v. State,* 256 S.W. 929 (Tex.Crim.App. 1923).

As the Appellant, Linda R. S., is the mother of an illegitimate child, she could not be criminally prosecuted for failure to support her child and is in absolutely no danger of being prosecuted for a violation of Article 602 of the Penal Code. As was noted by the Court below, the proper party to challenge the validity or constitutionality of Article 602 of the Texas Penal Code would be a parent of a legitimate child who was being prosecuted pursuant to Article 602. The challenge in such a case would be on the basis that because the parents of illegitimate children may not be prosecuted, the statute unfairly discriminates against the parents of legitimate children.

As to Appellants' challenge to Article 4.02 of the Texas Family Code, the Court below recognized that such challenge was improper to be considered by a three-judge federal court as there were no state officials or officers involved in the operation of Article 4.02. As noted by the Court below, Article 4.02 is enforceable through a civil suit for damages against a defaulting spouse. Consequently, this portion of Appellants' suit is pending before a one-judge federal court.

It might be helpful at this point to note that Appellants are relying upon 28 U.S.C. Sections 1331, 1343, 2201, 2202, 2281, 2284, and 42 U.S.C., Section 1983 to confer jurisdiction upon the federal courts.

A three-judge federal district court is a statutory creature with a limited sphere of operation. It is an extra-ordinary court and technical requirements relating to its jurisdiction are to be strictly construed. *Bailey v. Patterson,* 369 U.S. 31, 82 S.Ct. 549, 7 L.Ed. 2d 512 (1962). Section 2281 of Title 28 of the United States Code sets out the jurisdictional limitations binding on a three-judge court:

(1) an interlocutory or permanent injunction must be sought;

(2) the injunction sought must be one to restrain the action of a state officer or administrative agency;

(3) the action sought to be enjoined must consist of the enforcement or execution of a state statute; and

(4) the injunction must be sought on the ground that the state statute is unconstitutional.

Jehovah's Witnesses in State of Washington v. King County Hospital, 278 F.Supp. 488 (1967).

It is fundamental that the injunctive relief sought must be against a state officer performing a state-wide function for 28 U.S.C., Section 2281 to come into effect. *Moody v. Flowers* 389 U.S. 97, 87 S.Ct. 1544, 18 L.Ed.2d 643 (1967). The case of *Moody v. Flowers, supra,* cited the case of *Wylenz v. Sovereign Camp, W.O.W.,* 306 U.S. 573, 59 S.Ct. 709, 83 L.Ed. 994

(1939), where the court held that in addition to the requirement of a state officer being a party that such state officer must be more than a nominal party, stating:

> "This requirement is one of substance, not of form, and it is not satisfied by joining, as nominal parties Defendant, state officers whose action is not the effective means of enforcement or execution of the challenged statute."

None of the Appellees in this case have any duties in connection with the enforcement of Article 602 of the Texas Penal Code, or Article 4.02 of the Texas Family Code, with the exception of the District Attorney of Dallas County, Texas, a Defendant below, who has the responsibility of prosecuting violations of Article 602 of the Texas Penal Code in Dallas County. However, his responsibilities and functions are not state-wide as required by *Moody v. Flowers, supra.*, but restricted to Dallas County only.

Consequently, the Appellees submit that the Appellants have neither alleged nor proved sufficient grounds to confer jurisdiction upon the Court below pursuant to 28 U.S.C., Section 2281.

As to Appellants' allegations against the State of Texas as an Appellee, *Hans v. Louisiana,* 134 U.S. 1, 10 S.Ct. 504 (1890), and *Georgia Railroad and Banking Co. v. Redwine,* 342 U.S. 299, 72 S.Ct. 321 (1952), specifically provide that a federal court may not entertain an action brought by a citizen of a state against that state, even though such a suit is not expressly barred by the language of the Eleventh Amendment.

Further, *Loux v. Rhay,* 375 F.2d 55 (1967), provides that a civil rights case offers no exception to the rules set out by its statement that:

"Congress has not authorized actions against the States under the Civil Rights Act, Monroe v. Pate, 365 U.S. 167, 187-192, 81 S.Ct. 473, 5 L.Ed. 492; Williford v. People of California, 352 F.2d 474 (9th); Charlton v. City of Hialeah, 188 F.2d 421 (4th) and the Supreme Court has admonished federal courts to scrupulously confine their jurisdiction to the precise limits which the statute has to bind. (Healy v. Ratta, 292 U.S. 263, 270, 54 S.Ct. 700, 703, 78 L.Ed. 1248)."

One test for determining whether the Eleventh Amendment applies to a suit is set out in *Ex Parte Young,* 209 U.S. 123, 28 S.Ct. 441 (1907), where it is stated that:

". . . Individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the federal Constitution, may be enjoined by a federal court of equity from such action."

Section 1331 of Title 28 of the United States Code is the so-called federal question provision. It gives district courts jurisdiction of cases where the matter in controversy exceeds $10,000.00 and arises under the United States Constitution or a federal statutory enactment. The foregoing provision recognizes certain exceptions to the $10,000.00 jurisdictional amount, but only when such exceptions are spelled out in some other statute. In the instant proceeding the Appellants have completely failed to show that the instant proceeding is some exception to the necessity of alleging and proving the $10,000.00 jurisdictional amount. In the absence of such an exception the complaint must allege

the jurisdictional amount in good faith to give the court jurisdiction under 28 U.S.C., Section 1331. *Congress of Racial Equality v. Clemmons,* 323 F.2d 54 (5th Cir. 1963), cert.den. 375 U.S. 992, 84 S.Ct. 632, 11 L.Ed.2d 478. Of course, in addition to the allegations there must be proof which is completely lacking in this case. In view of the foregoing, the Appellees submit that the Appellants have not complied with the provisions of 28 U.S.C., Section 1331, in such a manner as to confer jurisdiction upon the Court below as they have alleged no exception to or proved the jurisdictional amount.

28 U.S.C., Sections 2201 and 2202, upon which the Appellants also rely for jurisdiction, are the so-called declaratory judgment provisions. These sections do not confer jurisdiction on federal courts, but merely provide an additional remedy once jurisdiction is acquired. *Pierce v. Jordan,* 333 F.2d 951 (9th Cir. 1964); *El Paso Building and Construction Trades Council v. El Paso Chapter Assoc. General Contractors,* 376 F.2d 797 (5th Cir. 1967). In addition federal courts will not undertake to give advisory opinions on state statutes. *Flast v. Cohen,* 392 U.S. 83, 20 L.Ed.2d 947, 88 S.Ct. 1942 (1968); *Audiocasting, Inc. v. State of Louisiana,* 143 F.Supp. 922 (D.C. La. 1956). There must be an actual controversy. *Evers v. Dwyer,* 358 U.S. 202, 79 S.Ct. 178, 3 L.Ed.2d 222 (1958); *Flast v. Cohen, supra.* The Appellees submit that in the instant proceeding the Appellants have failed to allege or show that there is any actual controversy between the Appellants and some officer of the State of Texas or even the State of Texas pertaining to the challenged statutes. The only controversy is between Appellant, Linda R. S. and the father of her child over child sup-

port payments which the federal courts have no jurisdiction to award. Consequently, the instant proceeding amounts to nothing more than the Court being asked to give an advisory opinion as to the constitutionality of certain State statutes. In view of the foregoing, the Appellees submit that the Appellants have failed to show that this Court has jurisdisction of the instant proceeding pursuant to 28 U.S.C., Section 2201 and 2202.

28 U.S.C., Section 1343 confers jurisdiction upon federal district courts in civil rights matters. In the instant proceeding only Section 1343(3) could possibly be applicable. However, Section 1343 does not stand alone to confer jurisdiction on federal courts. *Blaye v. Moore,* 315 F.Supp. 495 (S.D. Tex. 1970); *Lucero v. Donovan,* 258 F.Supp. 979 (C.D. Calif. 1966).

To support the Appellants' contention of jurisdiction pursuant to 28 U.S.C., Section 1343, the Appellants have referred to the provisions of 42 U.S.C., Section 1983. 42 U.S.C., Section 1983 is a civil rights remedy against the action of a person acting under color of State law and confers jurisdiction upon federal district courts. State action is required before this remedy is available and the wrongdoer must be clothed with authority of State law. *United States v. Classic,* 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368 (1941). An individual's action may constitute State action where a State officer conspires with an individual to create a wrong. *Dinwiddie v. Brown,* 230 F.2d 465 (5th Cir. 1956). Also an individual's action may constitute State action where such individual is performing a traditional State officer's function and cloaks himself under the authority of such an officer. *Hall v. Garson,* 430 F.2d 430 (5th Cir. 1970). The facts and pleadings

in this case have failed once again to meet these jurisdictional requirements.

28 U.S.C., Sections 2281 and 2284 do not confer jurisdiction on a federal court, but are a limitation upon the court's jurisdiction. Jurisdiction, if it exists at all, must rest upon some other statute. *Smith v. California,* 336 F.2d 530 (9th Cir. 1964).

In view of the foregoing authority, the Appellees submit that the Appellants have wholly failed to allege or prove the necessary grounds for conferring jurisdiction upon the Court below to entertain the instant proceeding, and therefore have failed to state a cause of action upon which relief may be granted.

As to the issue of standing, relied on by the Court below, the following portions of the opinion of this Court in *Flast v. Cohen, supra* readily disclose the correctness of the decision of the Court below that Appellants lacked standing to challenge Article 602 of the Texas Penal Code.

> "... *The fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated.* The 'gist if the question of standing' is whether the party seeking relief has 'alleged such a personal stake in the out come of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' Baker v. Carr, 369 U.S. 186, 204, 7 L.Ed.2d 663, 82 S.Ct. 691 (1962). In other words, when standing is placed in issue in a case, *the question is whether the person whose standing is challenged is a proper party to request an adjudication of a*

particular issue and not whether the issue itself is justiciable. . . ." (Emphasis added).

In the instant case, the Appellants have no "personal stake" in whether a criminal statute is declared unconstitutional because they are not and cannot be prosecuted pursuant to this statute. In addition, the validity or invalidity of the statute will have no bearing on whether support from the illegitimate child's father is forthcoming. The validity of Article 602 of the Texas Penal Code is justiciable, but not by these Appellants in the way sought.

CONCLUSION

The Appellees submit that the Appellants have neither plead, and certainly not proved, the necessary elements to confer jurisdiction upon the Court below, and the judgment entered on November 1, 1971, by the United States District Court for the Northern District of Texas, Dallas Division, should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Pat Bailey, one of the attorneys for the Appellees and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 8th day of March, 1972, I served a copy of the foregoing Motion to Affirm on the Appellants by depositing a copy in the United States mail, postage prepaid, and addressed to the attorney of record for Appellants as follows: Mr. Windle Turley, 2000 McKool Building, 5025 North Central Expressway, Dallas, Texas.

PAT BAILEY